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Justice Holmes and acquiesced in by the late Chief Justice Fuller and Mr. Justice McKenna.

The Pullman Co. v. Kansas and Ludwig v. Western Union Telegraph Co. are in accord with the Western Union Telegraph Co. v. Kansas. The Southern Railway v. Greene is decided on different grounds. On the authority of Pembina Mining Co. v. Penna., *supra*, corporations are within the terms of the "equal protection of the laws" clause of the Constitution. A licensed foreign corporation is to be regarded as a corporation and if the statute does not embrace domestic corporations, it does not give equal protection. This argument is expressly used in the Herndon case, but is made as an additional reason for invalidating the statute rather than as the principal reason.

The inevitable conclusion to be drawn from these cases seems to us to be, that the Supreme Court has considerably restricted the long line of cases hitherto decided.

E. S. McK.

CONSTRUCTIVE TRUSTS—SUFFICIENCY OF EVIDENCE.—Where a purchaser at sheriff's sale has promised orally to hold the land in trust for the judgment debtor, and after he has taken title has denied the trust and claims the beneficial interest in the land for himself—under what circumstances should a court of equity compel him as a constructive trustee to reconvey?

Among other things, it is universally held that if the transaction is attended by circumstances which show legal fraud on the part of the purchaser, a constructive trust will arise.¹ Legal fraud may be defined as any intentional misstatement of a material fact by which another is induced to change his position to his detriment.² The condition of the purchaser's mind at the time he gets title by an absolute conveyance, is held in most jurisdictions to be a material fact. Thus, if the judgment debtor has been induced to permit the purchaser to acquire title at the sale for an inadequate consideration by reason of the purchaser's oral promise to hold in trust for him when the purchaser had no intention at the time of performing the promise, a clear case of legal fraud is made out. But suppose the purchaser made the promise in good faith but later repudiated it, what are the consequences? It is evident that there is no legal fraud in this case because the purchaser truly stated his intention, which was the inducement to lead the judgment debtor into the transaction, and the bare fact of inadequacy of consideration really proves nothing as to the *bona fides* of the transaction. It is also evident that the detriment which the latter has sustained is the same in both cases.

The prevailing American doctrine is to deny relief in the

¹Brison v. Brison, 75 Cal. 525 (1888).

²See discussion in Peek v. Derry, L. R. 14 App. Cas. 541.

second case. It is usually expressed in the language that a mere refusal to perform a parol promise which is void under the Statute of Frauds, is not a fraud, either at law or in equity.³ This position has driven the American courts to a more detailed consideration of what circumstances amount to legal fraud, and the strong equity in the case has induced them, in some instances, to a liberality of presumption in favor of fraud.⁴

The recent case of *Harras v. Harras*⁵ is, in result, in accord with the prevailing American doctrine and lays down the rule that the evidence of legal fraud must be "clear, cogent, and convincing" to enable the court to order a reconveyance. Thus, there is not even a liberality of presumption in that jurisdiction. The court enumerates the circumstances surrounding such a transaction from which fraud may properly be inferred as follows: (1) Where there existed between the judgment debtor and the purchaser a confidential relation aside from that created by the agreement to purchase. (2) Where the judgment debtor supplied a part of the purchase money. (3) Where the judgment debtor was lulled into inactivity by reason of the promise and was prevented from protecting his rights in the land, or refrained therefrom. (4) Where the purchaser was, by his promise, enabled to get the land at a price materially below its actual value. (5) Where the judgment debtor remained in possession and made valuable improvements.

As practically all of these elements were in that case the court decreed a re-conveyance, but it is submitted that a strict adherence to the rule of this case would work injustice, not only in a case where the evidence of legal fraud is less clear, but as well in the case where there is no evidence of legal fraud.

The fact that it was a judicial sale in the case under discussion is immaterial,⁶ and, therefore, for the purpose of simplicity, it may be well to state the question in another form: Where A conveys land to B upon oral trust to hold for A, and B repudiates the trust which he assumed in good faith, does such a case contain sufficient equity to enable the court to order B, as constructive trustee, to reconvey to A? In this case, as pointed out above, it is apparent that when the parties come into court, since B has paid either no consideration at all or a wholly inadequate

³ *Wheeler v. Reynolds*, 66 N. Y. 227 (1876); *Nash v. Jones*, 41 W. Va. 769 (1896); *Fairchild v. Rasdall*, 9 Wis. 379 (1859); *Mescall v. Tully*, 91 Ind. 96 (1883); *Calder v. Morgan*, 49 Mich. 14 (1882); *Wolford v. Farnham*, 44 Minn. 159 (1890); *Marcel v. Marcel*, 70 Neb. 498 (1903); *Lovett v. Taylor*, 54 N. J. Eq. 311 (1896); *Barry v. Hill*, 166 Pa. St. 344 (1895); *Baker v. Baker*, 72 Atl. Rep. 1000 (N. J. Ch. 1909).

Contra: *Davis v. Ott*, 35 Beav. 208; *Haigh v. Kaye*, L. R. 7 Ch. App. Cas. 469; *Marlborough v. Whitehead*, 2 Ch. 133 (1894); *Cromwell v. Norton*, 79 N. E. Rep. 433 (Mass. 1906); *Dictum—Peacock v. Peacock*, 50 Mo. 256, 261.

⁴ *Larmon v. Knight*, 140 Ill. 232 (1892); *Beegle v. Wentz*, 5 P. F. Smith, 369; *Boynton v. Housler*, 23 P. F. Smith, 453.

⁵ 110 Pac. Rep. 1085 (Wash. 1910).

⁶ *Beegle v. Wentz*, and *Boynton v. Housler*, *supra*.

consideration, he should not in equity and good conscience be allowed to retain the advantage he has acquired over A. The cases which refuse to order a reconveyance in this case proceed upon the ground that it would amount to sustaining an oral trust in land, contrary to the seventh section of the Statute of Frauds. Although A would receive the same relief that he would by the enforcement of the express trust, it is submitted that this is a mere coincidence. As pointed out by the late Professor Ames, the prevailing American doctrine which leaves A without remedy, grows out of the failure of the courts to distinguish between specific performance of an agreement and compulsory restitution of the consideration for the agreement.¹ A's right of *restitutio in integrum* seems as strong in this case as in the case where a *cestui que trust* has parted with a valuable consideration relying upon the oral promise of the owner of land to hold in trust for him which, the promisor later repudiates. Yet in this latter case the courts uniformly compel the promisor to restore the consideration to the promisee, regardless of whether the circumstances of the case show legal fraud. Similarly, one who has received money for an oral promise to convey land, and refuses to convey, must refund the money.² It also seems anomalous that American courts which will admit oral evidence to show that an absolute conveyance was intended to operate as a mortgage—and which hold that the mere proof of that intention at the time of the transaction is sufficient to establish the grantor's equity irrespective of the presence or absence of strict legal fraud—will deny relief in this case which involves the same equity.³

If these principles may properly be applied to the case of an execution sale upon a judgment, it is submitted that the equity of the judgment debtor arises as soon as he proves the existence of an oral trust agreement and a subsequent breach, and that the only decree which will give him complete relief is one which restores him to the *status quo*, viz.: reconveyance by the purchaser and a restoration by him to the purchaser of any money that has been spent by the latter in the transaction.

J. F. S.

¹Constructive Trusts Based Upon the Breach of an Express Oral Trust in Land.—20 Har. Law R., at p. 552.

²Cook v. Doggett, 2 Allen (Mass.), 439; Gilbert v. Maynard, 15 Johns (N. Y.), Rineer v. Rollins, 156 Pa. St. 342.

³Campbell v. Dearborn, 109 Mass. 130.